February 16, 2017

SEC Rulemaking Developments in 2016

Authors: Jeffrey Nadler, Scott D. Fisher, Paul Watkins, Nir Servatka, Jennifer Liu and Rachel Charney

The U.S. Securities and Exchange Commission (SEC) had a busy rulemaking year in 2016. As part of its Disclosure Effectiveness Initiative launched at the end of 2013, the SEC continued to propose and adopt rules that are intended to improve and modernize the disclosure requirements for reporting companies. The SEC also continued to implement sections of the *Jumpstart Our Business Startups Act* (JOBS Act) and the *Fixing America's Surface Transportation Act* (FAST Act) to provide more flexibility in capital raising and reduce the regulatory burden on private companies.

Despite the SEC's intensive rulemaking in 2016, with Mary Jo White stepping down as SEC Chair in January 2017 and President Donald Trump's expressed commitment to scale back on financial regulations, 2017 may be the beginning of a new era from a U.S. securities law perspective. President Trump has already taken preliminary steps to reduce some of the regulatory burdens imposed on reporting companies in the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act), landmark legislation crafted by the Obama administration and passed by Congress in 2010 in response to the economic meltdown. On February 14, 2017, President Trump signed into law Congress's repeal of the extractive industry transparency rules adopted by the SEC in June 2016 that required oil and gas companies to disclose payments from the U.S. and foreign governments. President Trump also signed an executive order directing the Department of the Treasury to restructure major provisions of the Dodd-Frank Act. While some believe that U.S. securities laws are set for potentially significant changes in 2017, the impact of this executive order and other measures yet to be announced by the Trump administration on U.S. securities laws generally, and SEC rulemaking in particular, remains to be seen.

This update provides an overview of the following significant U.S. securities law and regulatory developments in 2016:

1. Final SEC rules facilitating intrastate and regional securities offerings
2. Final SEC rule amendments increasing the thresholds for Exchange Act registration, termination of registration and suspension of reporting
3. Interim final SEC rule amending Form 10-K to allow a summary section
4. Final Nasdaq rule requiring listed companies to disclose third-party payments to directors and director nominees
5. Final New York Stock Exchange rule change requiring semi-annual financial reporting by foreign private issuers
6. SEC staff guidance on the definition of "foreign private issuer"
7. SEC staff guidance on non-GAAP financial measures
8. Proposed SEC rules modernizing property disclosures for mining registrants
9. Proposed SEC rules requiring the use of universal proxies
10. Proposed SEC rules requiring hyperlinks to exhibits in filings

Although some of these rules are applicable only to U.S. issuers, we believe these developments should be of interest to market participants abroad, as well as Canadian issuers and their advisers.

1. Final SEC rules facilitating intrastate and regional securities offerings

In October 2016, the SEC modernized the exemptions for intrastate securities offerings to facilitate capital raising for smaller companies.

2. Final SEC rule amendments increasing the thresholds for Exchange Act registration, termination of registration and suspension of reporting

In May 2016, the SEC adopted rule amendments pursuant to sections 12(g) and 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act) to implement higher thresholds for registration, termination of registration and suspension of reporting obligations under the Exchange Act. The rule amendments were adopted under the JOBS Act and the FAST Act to reduce the regulatory burden of private companies and provide more flexibility for their capital raising.

3. Interim final SEC rule amending Form 10-K to allow a summary section

An interim final rule of the SEC, which became effective on June 9, 2016, amended Form 10-K to allow (but not require) issuers to provide a summary section in their annual reports so long as each item in the summary "is presented fairly and accurately" and includes a cross-reference by hyperlink to the more detailed material contained in the issuer's Form 10-K to which the item relates. Issuers that summarize information that is incorporated by reference into the Form 10-K from an exhibit that is filed with the form must include a hyperlink from the summary to the accompanying exhibit.

4. Final Nasdaq rule requiring listed companies to disclose third-party payments to directors and director nominees

In August 2016, the Nasdaq Stock Market LLC (Nasdaq) adopted a rule requiring listed companies to publicly disclose the material terms of all agreements and arrangements between a director or director nominee and any third party relating to compensation and other payments in connection with that person's candidacy or service as a director. The new rule is intended to enhance the transparency of the governance processes of listed companies by disclosing compensation arrangements that could raise conflicts of interest among directors.

The new rule applies to all Nasdaq-listed companies, except that foreign private issuers may elect to follow their home country practices in lieu of the new rule, subject to the typical conditions in the Nasdaq rules that are applicable to foreign private issuers that elect to follow their home country practices.

5. Final NYSE rule change requiring semi-annual financial reporting by foreign private issuers

In February 2016, the SEC approved a New York Stock Exchange amendment to its *Listed Company Manual*, requiring each listed foreign private issuer to, at a minimum, submit to the SEC a Form 6-K that includes (i) an interim balance sheet as of the end of its second fiscal quarter; and (ii) a semi-annual income statement that covers its first two fiscal quarters. This Form 6-K must be submitted no later than six months after the end of the company's second fiscal quarter and applies to any fiscal year commencing on or after July 1, 2015. The financial information included in the Form 6-K must be presented in English, but does not have to be reconciled to U.S. generally accepted accounting principles (GAAP).

6. SEC staff guidance on the definition of "foreign private issuer"

In December 2016, the SEC staff updated its Compliance and Disclosure Interpretations to provide further guidance on the definition of "foreign private issuer" under Rule 405 under the *Securities Act of 1933*, as amended, and Rule 3b-4(c) under the Exchange Act.

7. SEC staff guidance on non-GAAP financial measures

In May 2016, the SEC staff updated its Compliance and Disclosure Interpretations to provide guidance on the use and presentation of non-GAAP financial measures, to address increasing concerns that these measures were being used improperly. This guidance is also relevant to Canadian public companies and other foreign private issuers that are SEC registrants, especially to those that prepare financial statements in accordance with GAAP in the United States.

8. Proposed SEC rules modernizing property disclosures for mining registrants

In June 2016, as part of its Disclosure Effectiveness Initiative, the SEC announced proposed rules to modernize the disclosure requirements for mining properties by aligning them with current industry and global regulatory practices and standards in order to provide more meaningful information to investors.

9. Proposed SEC rules requiring the use of universal proxies

In October 2016, the SEC proposed new rules under the Exchange Act that would require parties soliciting proxies in contested director elections to use universal proxies listing all the nominee director candidates for whom proxies are being solicited. The purpose of the proposed rules is to have the proxy voting process better mirror the in-person voting process that takes place at shareholders' meetings so that shareholders voting by proxy may vote for any combination of the registrant and dissident nominees. The proposed rules apply only to registrants that are subject to the U.S. federal proxy rules and, therefore, will not affect foreign private issuers, including Canadian public companies with securities listed on a U.S. stock exchange.

10. Proposed SEC rules requiring hyperlinks to exhibits in filings

In August 2016, the SEC proposed rules and form amendments that would require each SEC registrant that is filing a registration statement or current report that is subject to the exhibit requirements under section 601 of Regulation S-K, or that is filing a Form F-10 or 20-F, to include a hyperlink to each exhibit that is listed in the exhibit index of the SEC filing. The proposed rules, which are part of the SEC's Disclosure Effectiveness Initiative, are primarily intended to allow users of EDGAR to access exhibits in an efficient manner via a hyperlink. As currently proposed, the rules would not require Canadian issuers that are SEC registrants to include hyperlinks to exhibits in multijurisdictional disclosure system forms filed with the SEC.

Final SEC Rules Facilitating Intrastate and Regional Securities Offerings

Authors: Jeffrey Nadler and Rachel Charney

On October 26, 2016, the U.S. Securities and Exchange Commission (SEC) modernized the exemptions for intrastate securities offerings to facilitate capital raising for smaller companies. The SEC:

- expanded the existing Rule 147 safe harbour under section 3(a)(11) of the *Securities Act of 1933*, as amended (Securities Act);
- established Rule 147A under the Securities Act, a new intrastate offering exemption;
- increased the amount of securities that may be offered and sold under Rule 504 in any 12-month period from $1 million to $5 million and added a provision disqualifying bad actors from participation in Rule 504 offerings; and
- repealed Rule 505 of Regulation D.

Foreign private issuers are incorporated and typically have their principal place of business abroad and, therefore, are unlikely to benefit from (or be affected by) these changes.

Rule 147

Many state law exemptions, including crowdfunding provisions, are based on the exemption in section 3(a)(11) of the Securities Act. Rule 147 is an intrastate offering exemption that permits issuers to raise capital from investors within their state by complying with state securities or "blue sky" laws without registering the offers and sales under the Securities Act. The key requirements for an issuer to qualify for the exemption in amended Rule 147 include the following:

- The issuer must be organized and have its "principal place of business" in the state where the securities are offered and sold.
- The issuer may engage in general advertising and general solicitation to market its securities only within the state where the securities are offered and sold, and there is no limit on the amount of securities that may be sold under the safe harbour.
- The issuer must satisfy at least one of four updated "doing business" requirements to demonstrate the in-state nature of the issuer's business.[1]
- The issuer must have a "reasonable belief" with respect to the in-state residency status of the purchaser at the time of the sale of securities (determined on the basis of all facts and circumstances), and the issuer must still obtain a written representation from each purchaser as to the purchaser's residency.[2]

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[1] Before the adoption of the final rules, issuers had to satisfy three "doing business" requirements to qualify for an exemption under Rule 147.

[2] Obtaining a written representation from each purchaser is not dispositive of the purchaser's residency. The exemption will not be lost as a result of a sale to an out-of-state resident so long as the issuer reasonably believed that the investor was an in-state resident.

- Resales of securities by purchasers to persons residing within the state of the offering are restricted for a period of six months from the date of the sale by the issuer to the original purchaser under the exemption.
- The issuer must provide certain disclosures, including securities legends, to offerees and purchasers regarding the limits on resales and other matters.

New Rule 147A

To further facilitate capital raising for smaller companies, the SEC adopted new Rule 147A, using its general authority under section 28 of the Securities Act. The requirements of Rule 147A are substantially identical to the requirements of amended Rule 147, with two exceptions.

First, while Rule 147 prohibits an issuer from making offers and sales to out-of-state residents, and requires the issuer to be incorporated or organized in the state in which the intrastate offering is being made, Rule 147A has no such limitations. An issuer may be incorporated or organized outside the state in which it conducts an offering under Rule 147A (for example, in Delaware to take advantage of well-established bodies of corporate or partnership law in that state), provided the issuer's principal place of business is in the state and it otherwise complies with the requirements of Rule 147A. For example, a Delaware corporation, limited liability company or partnership that has its principal place of business outside the state of Delaware may be able to rely on Rule 147A to conduct an offering in the state where the issuer resides but would still not satisfy the requirements of amended Rule 147.

Second, an issuer relying on Rule 147A may make offers accessible to out-of-state residents (through general solicitation or general advertising on the Internet, for example), so long as sales are limited to in-state residents. Amended Rule 147 requires that issuers make offers and sales only to in-state residents.

Section 12(g) Limits

In contrast to the provisions of the SEC's Regulation Crowdfunding and the Tier 2 exemption of Regulation A (which trigger ongoing reporting requirements), equity securities issued in intrastate or regional offerings under Rules 147, 147A and 504 are not excluded when calculating the number of record holders for purposes of registering a class of securities under section 12(g) of the *Securities Exchange Act of 1934*, as amended.[3]

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[3] A U.S. issuer that, on the last day of its fiscal year, has more than $10 million of total assets and, as a result of issuing equity securities in exempt offerings under Rules 147, 147A or 504, has securities "held of record" by either (i) 2,000 persons or (ii) 500 persons who are not "accredited investors" will be required to register the class of equity securities under section 12(g) of the Exchange Act. Foreign private issuers must also have 300 or more holders of record that are U.S. residents before triggering that requirement.

Final SEC Rule Amendments Increasing the Thresholds for Exchange Act Registration, Termination of Registration and Suspension of Reporting

Authors: Scott D. Fisher, Nir Servatka and Jennifer Liu

On May 3, 2016, the U.S. Securities and Exchange Commission (SEC) adopted rule amendments pursuant to sections 12(g) and 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act) to implement higher thresholds for registration, termination of registration and suspension of reporting obligations under the Exchange Act. The rule amendments were adopted under the *Jumpstart Our Business Startups Act* and the *Fixing America's Surface Transportation Act* to reduce the regulatory burden of private companies and provide more flexibility for their capital raising.

Increased Thresholds for Registration and Reporting Requirements

An issuer that is not a bank, bank holding company or savings and loan holding company (Bank) is required to register a class of equity securities under the Exchange Act if, on the last day of its fiscal year, the issuer has more than $10 million of total assets and such class of securities is held of record by either (i) 2,000 persons or (ii) 500 persons who are not accredited investors.[4] An issuer that is a Bank is required to register a class of equity securities under the Exchange Act if, on the last day of its fiscal year, the issuer has more than $10 million of total assets and such class of securities is held of record by 2,000 or more persons (without regard to accredited investor status). Before the rule amendment, the threshold for registration under the Exchange Act for all issuers was set at 500 persons (without regard to accredited investor status). Foreign private issuers are exempt from registration under the Exchange Act if the class of securities is held of record by fewer than 300 U.S. residents.

Increased Thresholds for Termination of Registration and Suspension of Reporting

An issuer that is a Bank may terminate the registration of a class of securities under section 12(g) of the Exchange Act or suspend the registration of its reporting obligations under section 15(d)(1) of the Exchange Act if such class of securities is held of record by fewer than 1,200 persons (as opposed to the 300-person threshold that was in effect prior to the rule amendment). An issuer that is not a Bank remains subject to the 300-person threshold for termination of registration and suspension of reporting.

Exclusion of Securities from the Definition of "Held of Record"

The definition of "held of record" excludes (i) securities held by persons who received them pursuant to an employee compensation plan in transactions exempted from the registration

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[4] The definition of "accredited investors" in Rule 501(a) under the *Securities Act of 1933* applies when determining whether the shareholder threshold has been met. The determination must be made as of the last day of the issuer's fiscal year rather than at the time of sale of the securities.

requirements of section 5 of the Securities Act; and (ii) securities held by persons who received them in a transaction exempt from, or not subject to, the registration requirements of section 5 of the *Securities Act of 1933*, as amended (Securities Act) from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for securities that are excluded under clause (i) above, as long as the persons were eligible to receive securities pursuant to Rule 701(c) under the Securities Act at the time the excludable securities were originally issued to them.[5] With the second prong of the definition, the SEC aims to facilitate the ability of an issuer to conduct restructurings, business combinations and similar transactions that are otherwise exempted from registration under the Securities Act by deeming the securities issued in such an exchange to have had a compensatory purpose as long as the surrendered securities would not have counted as "held of record" at the time they were issued.

The term "employee compensation plan" is not defined. Instead, the rule includes a non-exclusive safe harbour to help issuers determine holders of record by allowing an issuer (i) to deem a person to have received the securities under an employee compensation plan if the plan and the person who received the securities under the plan met the conditions of Rule 701(c) under the Securities Act; and (ii) to deem, for the purposes of section 12(g) only, that the securities had been issued in a transaction exempt from, or not subject to, the registration requirements of section 5 of the Securities Act if the issuer had reasonable belief at the time of the issuance that the securities were issued in such a transaction.

Foreign private issuers may rely on the safe harbour solely for the purpose of determining the number of U.S. resident holders of record. However, the safe harbour does not apply for the purposes of determining foreign private issuer status, which means that securities held by employees of a foreign private issuer will continue to be counted when calculating the percentage of an issuer's outstanding securities held by U.S. residents.

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[5] Rule 701 provides an exemption from registration under the Securities Act for offers and sales of securities pursuant to an eligible compensatory benefit plan, which is defined as a purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan. The exemption is available to any issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, and that is not an investment company registered or required to be registered under the *Investment Company Act of 1940*.

Interim Final SEC Rule Amending Form 10-K to Allow a Summary Section

Authors: Jeffrey Nadler and Paul Watkins

An interim final rule of the U.S. Securities and Exchange Commission (SEC), which became effective on June 9, 2016, amended Form 10-K to allow (but not require) issuers to provide a summary section in their annual reports so long as each item in the summary "is presented fairly and accurately" and includes a cross-reference by hyperlink to the more detailed material contained in the issuer's Form 10-K to which the item relates. Issuers that summarize information that is incorporated by reference into the Form 10-K from an exhibit that is filed with the form must include a hyperlink from the summary to the accompanying exhibit.

The new section 16 is intended to provide issuers with flexibility in preparing the summary and does not prescribe the length of the summary (other than to state that the summary shall be brief), specify the Form 10-K disclosure items that should be covered by the summary or dictate where the summary must appear in the Form 10-K. Information may be included in the summary only if it is included in the Form 10-K when the form is filed. The summary cannot refer to information to be filed in a subsequent SEC filing, such as a proxy statement. An issuer that includes a summary in its Form 10-K filing is not required to subsequently file an amendment to that Form 10-K to expand the summary just to include Part III information (which includes disclosure about executive officers, directors and executive compensation) incorporated by reference into the Form 10-K from a proxy or information statement filed after the Form 10-K is filed. The issuer must, however, indicate that the summary does not include Part III information.

Few issuers have traditionally included a summary section in their Form 10-Ks and, given that the new rules do not require a summary and the previous rules did not prohibit an issuer from including a summary, it is questionable whether the new rules will have a noticeable impact on Form 10-K practice.

Final Nasdaq Rule Requiring Listed Companies to Disclose Third-Party Payments to Directors and Director Nominees

Authors: Jeffrey Nadler and Nir Servatka

On August 1, 2016, the Nasdaq Stock Market LLC (Nasdaq) adopted a rule requiring listed companies to publicly disclose the material terms of all agreements and arrangements between a director or director nominee and any third party relating to compensation and other payments in connection with that person's candidacy or service as a director. The new rule is intended to enhance the transparency of the governance processes of listed companies by disclosing compensation arrangements that could raise conflicts of interest among directors. The new rule applies to all Nasdaq-listed companies, except that foreign private issuers may elect to follow their home country practices in lieu of the new rule, subject to the typical conditions in the Nasdaq rules that are applicable to foreign private issuers that elect to follow their home country practices.

Disclosure of such agreements and arrangements is required by the date the company files or furnishes a definitive proxy or information statement in connection with its next shareholders' meeting at which directors are elected. If a company does not file proxy or information statements, the disclosure must be made no later than the date on which the company files its next annual report on Form 10-K or Form 20-F.[6] The disclosure must be made either on the company's website (either directly or through a hyperlink) or in the company's definitive proxy or information statement for its next shareholders' meeting at which directors are elected (or, if the company does not file proxy or information statements, in its annual report on Form 10-K or Form 20-F). A company must make the disclosure required by the rule annually until the earlier of the resignation of the director or one year following the termination of the agreement or arrangement.

Under the new rule, Nasdaq-listed companies are not required to disclose agreements and arrangements that

- relate only to reimbursement of expenses in connection with the nominee's candidacy as a director;
- existed before the nominee's candidacy (including as an employee of the other person or entity) and the nominee's relationship with the third party has been publicly disclosed in a definitive proxy or information statement or annual report (such as in the director's or nominee's biography), provided that a material increase in the amount of a director's or nominee's remuneration is disclosed if it specifically relates to his or her candidacy or service as a director; or
- have been disclosed under Item 5(b) of Schedule 14A or Item 5.02(d) of Form 8-K in the current fiscal year.

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[6] Canadian companies eligible to file annual reports on Form 40-F may use this form.

The new rule provides a safe harbour for a company that fails to provide timely disclosure of a third-party director compensation arrangement. Under the new rule, a company that fails to provide timely disclosure of a third-party director compensation arrangement will not be considered deficient in its disclosure requirements if (i) it has undertaken reasonable efforts to identify all arrangements required to be disclosed under the new rule, including by asking each director or nominee in a manner designed to allow timely disclosure; and (ii) upon discovery of the failure to disclose such arrangement, it promptly makes the required disclosure in a Form 8-K or 6-K, where required by SEC rules, or in a press release. A company that is deficient in its disclosure requirements must submit to Nasdaq a plan to regain compliance within 45 days of its receipt of a written notification from the Nasdaq staff informing the company of such deficiencies. If the company does not do so, the Nasdaq staff would issue the company a delisting determination, which the company could appeal in accordance with Nasdaq rules.

Final NYSE Rule Change Requiring Semi-Annual Financial Reporting by Foreign Private Issuers

Author: Scott D. Fisher

On February 19, 2016, the U.S. Securities and Exchange Commission (SEC) approved a New York Stock Exchange (NYSE) amendment to its *Listed Company Manual*, requiring each listed foreign private issuer to, at a minimum, submit to the SEC a Form 6-K that includes (i) an interim balance sheet as of the end of its second fiscal quarter; and (ii) a semi-annual income statement that covers its first two fiscal quarters. This Form 6-K must be submitted no later than six months after the end of the company's second fiscal quarter and applies to any fiscal year commencing on or after July 1, 2015. The financial information included in the Form 6-K must be presented in English, but does not have to be reconciled to U.S. generally accepted accounting principles.

In adopting this rule change, the NYSE framed the new section 203.03 of its *Listed Company Manual* as essential to investor protection and a critical update to the prior rule, which mandated only annual financial disclosure. The NYSE also noted that this standard is not as burdensome as requirements already imposed upon domestic issuers, which are required by SEC rules to file Form 10-Q, a quarterly report containing unaudited financial information, within a specified period after the end of each of the company's first, second and third fiscal quarters. The NYSE acknowledged that financial reporting practices in other countries may differ from those in the United States and that not all foreign companies issue interim financial information on a quarterly basis. However, almost all listed foreign private issuers issue interim financial information on at least a semi-annual basis.[7] The NYSE rule change is also consistent with existing rules for foreign private issuers listed on Nasdaq, as Nasdaq Listing Rule 5250(c)(2) requires each Nasdaq-listed foreign private issuer to furnish a Form 6-K to the SEC with an interim balance sheet and income statement as of the end of the foreign private issuer's second quarter.

Under the existing instructions to Form 6-K, a foreign private issuer must furnish to the SEC whatever information not required to be furnished on Forms 20-F or 40-F or not previously furnished it (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized; or (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange; or (iii) distributes or is required to distribute to its securityholders. Accordingly, many issuers (including Canadian issuers that are required by home country practice to file quarterly financial statements) already furnish financial statements to the SEC on Form 6-K more frequently than semi-annually.

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[7] NYSE also amended section 103.00 of the *Listed Company Manual* to clarify that, notwithstanding the provision in that section that allows listed foreign private issuers to follow home country practice in lieu of complying with the NYSE's interim reporting requirements applicable to domestic companies, all listed foreign private issuers will be required to disclose interim financial information on Form 6-K on a semi-annual basis in compliance with proposed section 203.03.

In addition, the NYSE made a corresponding change to section 802.01E of its *Listed Company Manual* to subject listed foreign private issuers that have not timely filed the required Form 6-K to the same compliance procedures as are applied to listed companies that are late in filing their annual report on Form 10-Q. Failure to file the required Form 6-K within the period specified by proposed section 203.03 constitutes a Late Filing Delinquency under section 802.01E. As with any other Late Filing Delinquency under that rule, a company that delays filing its Form 6-K will have an initial six-month compliance period (subject to extension at NYSE's discretion) within which to file the Form 6-K and any subsequently due filing. Any company that fails to meet its filing obligations within the compliance periods provided under the rule will be subject to delisting.

SEC Guidance on Definition of "Foreign Private Issuer"

Authors: Jeffrey Nadler and Nir Servatka

On December 8, 2016, the staff of the U.S. Securities and Exchange Commission (SEC) updated its Compliance and Disclosure Interpretations (C&DIs) to provide further guidance on the definition of "foreign private issuer" under Rule 405 under the *Securities Act of 1933*, as amended (Securities Act), and Rule 3b-4(c) under the *Securities Exchange Act of 1934*, as amended (Exchange Act).

Background

Securities Act Rule 405 and Exchange Act Rule 3b-4(c) each define "foreign private issuer" as any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

- more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and
- any of the following: (i) the majority of the executive officers or directors are U.S. citizens or residents; (ii) more than 50% of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

Updated Staff Guidance

Determining percentage of U.S. residents holding voting securities when the issuer has multiple voting classes:

An issuer that has multiple classes of voting stock with different voting rights may choose one of two methods to determine whether more than 50% of the issuer's outstanding voting securities are directly or indirectly owned of record by residents in the United States: (i) the issuer may look to whether more than 50% of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States; or (ii) the issuer may make the determination based on the number of voting securities. An issuer should be consistent in applying its methodology.

Determining percentage of voting securities held by U.S. residents:

For the purpose of determining whether 50% of the issuer's outstanding voting securities are held of record by U.S. residents, a person who has permanent resident status in the United States is presumed to be a U.S. resident. Other individuals without permanent resident status may also be U.S. residents. In these circumstances, an issuer must decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result. Examples of factors an issuer may apply include tax residency, nationality, mailing address, physical presence, the location of a significant portion of their financial and legal relationships, and immigration status.

Determining percentage of U.S. executive officers and directors:

For the purpose of determining whether a majority of the executive officers or directors are U.S. citizens or residents, each group of persons must be treated separately. In effect, the issuer must make four determinations: the citizenship status of executive officers, the residency status of executive officers, the citizenship status of directors and the residency status of directors. If the issuer has two boards of directors, the issuer must make the determination with respect to the board that performs the functions closest to those undertaken by a U.S.-style board of directors. If those functions are divided between the two boards, the issuer may aggregate the members of both boards for the purpose of calculating the majority.

Determining percentage of assets located outside the United States:

For the purpose of determining whether more than 50% of the assets of an issuer are located outside the United States, an issuer can use the geographic segment information determined in the preparation of its financial statements. Alternatively, an issuer may apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets for the purpose of this determination.

Determining whether the issuer's business is administered principally in the United States:

There is no single factor or group of factors that is determinative of whether an issuer's business is principally administered in the United States. The issuer must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate the issuer's activities. Holding an annual or special meeting of shareholders or occasional meetings of the issuer's board of directors in the United States would not necessarily result in a determination that the issuer's business is administered principally in the *United States.*

SEC Guidance on Non-GAAP Financial Measures

Authors: Jeffrey Nadler and Nir Servatka

On May 17, 2016, the staff of the U.S. Securities and Exchange Commission (SEC) updated its Compliance and Disclosure Interpretations (C&DIs) to provide guidance on the use and presentation of non-GAAP financial measures, to address increasing concerns that these measures were being used improperly. This guidance is also relevant to Canadian public companies and other foreign private issuers that are SEC registrants, especially to those that prepare financial statements in accordance with generally accepted accounting principles (GAAP) in the United States.

Background

Non-GAAP financial measures are those numerical measures of a company's historical or future financial performance, financial position or cash flows that either exclude amounts that are included by GAAP or include amounts that are excluded by GAAP, such as EBIT (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation and amortization). Reporting companies often supplement their financing statements and other financial disclosures with non-GAAP financial measures to present unique measures that are intended to help investors evaluate performance.

In 2003, pursuant to a mandate under the *Sarbanes-Oxley Act of 2002*, the SEC adopted Regulation G to regulate the use of non-GAAP financial measures in press releases and other public statements (for example, webcasts) made by SEC reporting companies. Whenever a reporting company chooses to use a non-GAAP financial measure, it must also include the most comparable measure calculated in accordance with GAAP and a reconciliation of the non-GAAP financial measure to that GAAP measure. Regulation G also includes a general anti-fraud provision.[8] While Regulation G exempts foreign private issuers that satisfy certain requirements, the exemption is not available to foreign private issuers (including Canadian issuers) that use a non-GAAP financial measure derived from or based on a measure calculated and presented in accordance with U.S. GAAP.[9]

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[8] No registrant shall make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact, or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, misleading.

[9] Foreign private issuers are exempt from Regulation G if the following conditions are satisfied: (i) the foreign private issuer's securities are listed on a non-U.S. exchange; (ii) the non-GAAP financial measures included in the foreign private issuer's public communication are not derived from or based on a measure calculated and presented in accordance with GAAP; and (iii) the communication is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States. This exemption is not available for foreign private issuers that prepare and report financial statements in accordance with U.S. GAAP.

In addition, a reporting company cannot include a non-GAAP financial measure in a document filed with the SEC unless it also complies with the stricter requirements set forth in Item 10(e) of Regulation S-K.[10] Item 10(e) requires a reconciliation of the non-GAAP financial measure to the most *directly* comparable GAAP financial measure and a presentation with "equal or greater prominence" of the most *directly* comparable GAAP financial measure. A narrative description of the use and purpose of the non-GAAP financial measure is also required, including disclosure of the reasons why management believes that the non-GAAP financial measure provides useful information to investors regarding the issuer's financial condition and results of operations and material disclosure of any additional purposes for which management uses the non-GAAP financial measure. In addition, the use of certain potentially misleading non-GAAP financial measures is completely prohibited.[11] Foreign private issuers are generally subject to the stricter non-GAAP financial measure requirements of Item 10(e) of Regulation S-K in documents filed with the SEC, except that Canadian issuers are not subject to these stricter requirements in annual reports on Form 40-F or multijurisdictional disclosure system registration statements they file with the SEC.

Staff Guidance on Regulation G

The updated C&DIs provide examples of non-GAAP financial measures that the SEC staff believes could be potentially misleading and, therefore, could violate the anti-fraud provisions of Regulation G, including the following:

- presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business;
- presenting a non-GAAP financial measure inconsistently between periods by adjusting a particular charge or gain in the current period for which other similar charges or gains were not adjusted in prior periods; and
- presenting a non-GAAP financial measure that is adjusted for non-recurring charges but not for non-recurring gains that occurred during the same period.

Finally, non-GAAP financial measures that substitute individually tailored revenue recognition and measurement methods for those of GAAP could violate the anti-fraud provision of Regulation G.

Staff Guidance on Item 10(e) of Regulation S-K

The updated C&DIs provide examples of presentations of non-GAAP financial measures that the SEC staff would consider to violate Item 10(e) of Regulation S-K because they are presented more prominently than the comparable GAAP measures, including the following:

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[10] Regulation S-K applies to registration statements filed under the *Securities Act of 1933*, as amended, as well as registration statements, periodic and current reports and other documents filed under the *Securities Exchange Act of 1934*, as amended.

[11] Among other things, a registrant is not permitted to (i) exclude from non-GAAP liquidity measures (except for EBIT and EBITDA) charges or liabilities that required or will require cash settlement (or would have required cash settlement absent an ability to settle in another manner); or (ii) adjust a non-GAAP performance measure to eliminate or smooth a nonrecurring, infrequent or unusual item when the nature of the charge or gain is reasonably likely to recur within two years or where there has been a similar charge or gain within the prior two years.

- presenting a full income statement of non-GAAP financial measures or presenting a full non-GAAP income statement when reconciling non-GAAP financial measures to the most directly comparable GAAP measures;
- omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP financial measures;
- presenting a non-GAAP financial measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP financial measure over the comparable GAAP measure;
- having a non-GAAP financial measure that precedes the most directly comparable GAAP measure;
- describing a non-GAAP financial measure (for example, as “record performance” or “exceptional”) without an at least equally prominent descriptive characterization of the comparable GAAP measure;
- providing tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table; and
- providing discussion and analysis of a non-GAAP financial measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence.

While Item 10(e) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, it has been the SEC staff’s long-standing position that a per share non-GAAP financial measure that is used as a liquidity measure (as opposed to a performance measure) cannot be presented on a per share basis in documents filed or furnished with the SEC. The updated C&DIs indicate that whether per share data is prohibited depends on whether the non-GAAP financial measure can be used as a liquidity measure, even if management presents it solely as a performance measure. According to the updated C&DIs, when analyzing these questions, the SEC staff will focus on the substance of the non-GAAP financial measure and not management’s characterization of such measure. In addition, the updated C&DIs expressly provide that free cash flow is a liquidity measure that must not be presented on a per share basis and that EBIT or EBITDA must not be presented on a per share basis.

The updated C&DIs clarify that if an issuer presents EBIT or EBITDA as a performance measure, these measures should be reconciled to GAAP net income. GAAP operating income would not be considered the most directly comparable GAAP financial measure under Item 10(e) of Regulation S-K because EBIT and EBITDA make adjustments for items that are not included in operating income.

The updated C&DIs also clarify how income tax effects should be calculated and presented in relation to adjustments to arrive at a non-GAAP financial measure. According to the SEC staff, reporting companies should provide income tax effects on their non-GAAP financial measures depending on the nature of the measures. If the non-GAAP financial measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If the non-GAAP financial measure is a performance measure, the issuer should include current and deferred income tax expense commensurate with the non-GAAP financial measure of profitability. In addition, adjustments to arrive at a non-GAAP financial measure should not be presented “net of tax.” Rather, income taxes should be shown as a separate adjustment and clearly explained.

Reporting companies are encouraged to establish appropriate controls over the calculation and use of non-GAAP financial measures to ensure compliance with Regulation G and Item 10(e) of Regulation S-K, particularly in light of the updated SEC guidance, and to have their audit committee carefully oversee and monitor the use of such measures.

Proposed SEC Rules Modernizing Property Disclosures for Mining Registrants

Author: Scott D. Fisher

On June 16, 2016, as part of its Disclosure Effectiveness Initiative, the U.S. Securities and Exchange Commission (SEC) announced proposed rules to modernize the disclosure requirements for mining properties by aligning them with current industry and global regulatory practices and standards in order to provide more meaningful information to investors.

The SEC's disclosure requirements and related guidance for properties owned or operated by mining companies are contained in Item 102 of Regulation S-K and Industry Guide 7. Item 102 sets forth the basic disclosure requirements for a registrant's "principal" mines that are "materially important" and requires disclosure of "material information" concerning the "production, reserves, locations, development, and the nature of the registrant's interest," including additional disclosure requirements for individual properties that "are of major significance to an industry segment."

Industry Guide 7 sets forth the views of the staff of the Division of Corporation Finance on how mining company registrants can comply with the SEC's description of property disclosure requirements applicable to registrants. This guide has not been updated for more than 30 years. During this period, the SEC noted in its proposal, mining has become an increasingly globalized industry and several foreign countries have adopted mining disclosure standards based on the Committee for Mineral Reserves International Reporting Standards (CRIRSCO) that significantly differ from those in Industry Guide 7.

The proposed rules would rescind Industry Guide 7 and include the SEC's mining property disclosure requirements in a new subpart of Regulation S-K. The proposed revisions would update disclosure requirements for mining registrants in Item 102 of Regulation S-K under the *Securities Act of 1933*, as amended (Securities Act), and the *Securities Exchange Act of 1934*, as amended (Exchange Act), and related guidance in Industry Guide 7.

Oil and gas resources and operations are not covered by the proposed rules.

The SEC's proposed rules would

- require disclosure where a registrant's mining operations are material to its business or financial condition, with materiality presumed if a registrant's mining assets constitute 10% or more of its total assets;
- require disclosure relating to all mining-related activities, including exploration, extraction and sale;
- require a registrant to disclose mineral resources and material exploration results in addition to its mineral reserves;
- permit disclosure of mineral reserves to be based on a preliminary feasibility study or a final feasibility study that must include a life of mine plan, which would be the basis of determining the mineral reserve;
- provide updated definitions of mineral reserves and mineral resources based generally on the definitions under the CRIRSCO-based standards;

- require, in tabular format, summary disclosure for a registrant's mining operations as a whole as well as more detailed disclosure for a registrant's 20 properties with the largest asset values (or fewer, if the registrant has an economic interest in fewer than 20 mining properties);
- require that every disclosure of mineral resources, mineral reserves and material exploration results reported in a registrant's filed registration statements and reports be based on and accurately reflect information and supporting documentation prepared by a "qualified person," defined as a person who is both (i) a mineral industry professional with at least five years of relevant experience and (ii) a member or licensee of a recognized professional organization;
- require a registrant to obtain from the qualified person a technical report summary, which identifies and summarizes for each material property the information reviewed and conclusions reached by the qualified person about the registrant's exploration results, mineral resources or mineral reserves; and
- require disclosure of internal controls used in developing exploration and mineral resource and reserve estimates, including disclosure that addresses quality control and quality assurance programs, verification of analytical procedures and comprehensive risks inherent in the estimation.

The proposed disclosure requirements would be substantially similar to Canada's National Instrument 43-101, and so Canadian registrants that report pursuant to the multijurisdictional disclosure system may continue to prepare mining disclosure in accordance with Canadian disclosure requirements. However, foreign private issuers that use Form 20-F to file their Exchange Act annual reports and registration statements, or that refer to Form 20-F for their Securities Act registration statements on Forms F-1, F-3 and F-4, would have to comply with the mining disclosure requirements of the new Regulation S-K subpart 1300.

The original public comment period was extended until September 26, 2016, in order to allow interested parties additional time to analyze the issues and prepare their comments. For a proposal of this complexity and novelty, it could take a year or more before the SEC considers final rules, and the proposing release does not address how much time issuers would be given to comply with the new regime if it is adopted.

Proposed SEC Rules Requiring the Use of Universal Proxies

Authors: Jeffrey Nadler and Rachel Charney

On October 26, 2016, the U.S. Securities and Exchange Commission (SEC) proposed new rules under the *Securities Exchange Act of 1934*, as amended (Exchange Act), that would require parties soliciting proxies in contested director elections to use universal proxies listing all the nominee director candidates for whom proxies are being solicited. The purpose of the proposed rules is to have the proxy voting process better mirror the in-person voting process that takes place at shareholders' meetings so that shareholders voting by proxy may vote for any combination of the registrant and dissident nominees. The proposed rules apply only to registrants that are subject to the U.S. federal proxy rules and, therefore, will not affect foreign private issuers, including Canadian public companies with securities listed on a U.S. stock exchange.[12]

The Existing Proxy Rules: Limited Shareholder Choice in Contested Director Elections

The choices of shareholders voting by proxy in contested director elections are limited for two main reasons.[13] First, under the current proxy rules, a proxy may confer authority to vote only for a "bona fide" nominee, defined as a nominee who has consented to being named in the proxy statement and to serve if elected. Hence, one party may not include the other party's nominees on its proxy card unless the other party's nominees consent. Director nominees may (and often do) withhold their consent from being listed on opposing parties' proxies. The reasons for withholding consent include, in part, a perceived advantage in forcing shareholders to choose between competing slates of nominees, and avoiding the appearance of supporting the opposing party's position. Second, shareholder choice in contested director elections is limited because the existing proxy rules do not require either party to include the other party's director nominees on its proxy card. Therefore, even if a nominee consents to being named on the other party's proxy card, the other party can (and often will) determine not to include the nominee on its proxy card, since there is rarely an incentive to do so.

As a result, proxy cards in contested director elections typically present the registrant's director nominees as one slate in the registrant's proxy statement and proxy card, and the dissident's director nominees as a separate (full or partial) slate in the dissident's proxy statement and proxy card. Shareholders voting by proxy generally may not submit two separate proxy cards, so such shareholders are often forced to vote for the registrant's director nominees to the exclusion of the dissident's director nominees, or vice versa. In contrast, shareholders voting in person generally have the freedom to vote for a combination of the registrant's and dissident's director nominees by casting a written ballot provided at the meeting that includes the names of all duly nominated candidates.

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[12] The proposed universal proxy rules apply only to registrants with securities registered under section 12 of the Exchange Act that are subject to U.S. federal proxy rules. Registrants with reporting obligations only under Exchange Act section 15(d) and foreign private issuers are not subject to the federal proxy rules and, therefore, will not be subject to the proposed rules.

[13] Contested elections are director elections in which a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees.

The Proposed Rules: Universal Proxies

The proposed rules would require parties to provide shareholders voting by proxy with universal proxy cards in all non-exempt solicitations in connection with certain contested elections.[14] The universal proxy cards provided to shareholders will include the names of all duly nominated director candidates for whom proxies are solicited (clearly distinguishing between the registrant and the dissident nominees on the proxy cards) so that shareholders voting by proxy may vote for any combination of the registrant's and dissident's slates.

To facilitate the use of universal proxies, the SEC is proposing to expand the definition of "bona fide" nominee to a nominee who has "consented to being named in a proxy statement relating to the registrant's next annual meeting of shareholders at which directors are to be elected […] and to serve if elected." Therefore, once a nominee has consented to being named in a party's proxy statement, other parties can list the nominee in their own proxy statements without needing to solicit further consent from the nominee.

The proposed rules include notice requirements that facilitate the universal proxy regime. The dissident would be required to notify the registrant of the names of its nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting date.[15] The registrant would be required to notify the dissident of the names of its nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting date. Additionally, the dissident would be required to file its definitive proxy statement by the later of 25 calendar days before the meeting date or five calendar days after the date when the registrant files its definitive proxy statement.

If a registrant discovered after disseminating its definitive proxy statement with a universal proxy card that a dissident failed to file its definitive proxy statement 25 calendar days before the meeting (or five calendar days after the registrant filed its definitive proxy statement), the registrant could elect to disseminate a new, non-universal proxy card including only the names of the registrant's nominees.

"Vote No" Campaigns

The proposed rules do not apply to proponents conducting a solicitation without a competing slate, such as a "vote no" campaign (where a soliciting person is soliciting only "withhold" or "against" votes with respect to one or more of the registrant's nominees) or a solicitation where a shareholder is soliciting proxies only in support of a shareholder proposal. Those solicitations have no alternative director nominees, and so they would not raise the same concerns that mandatory universal proxy is intended to address, because the registrant's proxy card already provides shareholders with the ability to select their choice of nominees from all director candidates.

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[14] Non-exempt solicitations conducted by registered investment companies and business development companies would not be affected by the proposed rule.

[15] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided by the later of 60 calendar days before the date of the annual meeting or 10 calendar days following the day on which public announcement of the date of the annual meeting is first made by the registrant.

Solicitation Requirement

To prevent a "free rider" benefit, where dissidents capitalize on the registrant's solicitation efforts, the dissident would be required to solicit the holders of shares representing at least a majority of the voting power entitled to vote on the election of directors. The mandatory universal proxy requirement would be triggered only by a dissident that conducts a separate solicitation by distributing its own proxy statement and form of proxy. The proposed rules would also require a dissident to state in its proxy materials that it will solicit the holders of shares representing at least a majority of the voting power entitled to vote on the election of directors.

Where a dissident fails to comply with the proposed rules, the dissident would not be permitted to continue with its solicitation under Regulation 14A. Because a registrant may disseminate a universal proxy card before discovering that a dissident is not proceeding with its solicitation, the proposed rules require the registrant to include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favour of a dissident's nominees if the dissident abandons its solicitation or fails to comply with the proposed rules.

Elimination of the "Short Slate Rule"

The SEC is proposing to eliminate the "short slate rule," adopted in 1992. That rule applies only to a dissident seeking to elect a minority of the board in an election contest and permits the dissident to "round out its slate" by soliciting proxy authority to vote for some of the registrant nominees, other than those registrant nominees that the dissident has specified on its proxy card that the dissident will *not* vote for. While the short slate rule enables shareholders to use a proxy card to vote for all board seats up for election, the *dissident*, rather than the *shareholder*, chooses the nominees. Under the proposed rules that mandate universal proxies, shareholders will be able to vote on the universal proxy card for all board seats and select their own preferred combination of nominees from all registrant and dissident nominees. Therefore, the short slate rule would no longer be necessary to ensure that shareholders voting for a dissident's partial slate would have the opportunity to vote for a full slate of directors.

Voting Options and Voting Standards

The SEC has also proposed "clean-up" amendments to the form of proxy card and proxy statement disclosure requirements with respect to voting options and voting standards, in response to concerns that some company proxy statements had ambiguities or inaccuracies in their disclosures about voting standards in director elections. Specifically, the proposed rules would (i) require that proxy cards include an "against" voting option when applicable state laws give effect to a vote against; and (ii) give shareholders who neither support nor oppose a director nominee an ability to "abstain" (rather than "withhold authority to vote") in a director election governed by a majority voting standard. Finally, the proposed rules would mandate disclosure in proxy statements about the effect of a "withhold" vote in an election.

Differences Between the Universal Proxy System and Proxy Access

The proposed mandatory universal proxy system differs in significant respects from proxy access because it would not provide shareholders or their nominees with access to a registrant's proxy materials in the same manner and extent provided by proxy access bylaws.

Proxy access bylaws commonly require the registrant to include in its proxy statement the names of the nominating shareholder's nominees, disclosure required by Schedule 14A about the nominating shareholder and its nominees, and a statement provided by the nominating shareholder in support of its nominees' election to the board. Nominating shareholders complying with proxy access bylaws are not required to prepare and file their own preliminary and definitive proxy statements or disseminate any proxy material or solicit any shareholders. Information about their nominees is included in the registrant's proxy materials and provided to shareholders along with the registrant's proxy card listing the names of the nominating shareholder's nominees.

In contrast, the proposed mandatory universal proxy system would require only that the registrant include the names of the dissident nominees on its proxy card. No other disclosure about the dissident's nominees would be required by the registrant. The dissident would be wholly responsible for disseminating information about its nominees to shareholders and soliciting proxies in support of its nominees. The dissident's "access" in the proposed mandatory universal proxy system would be limited to the listing of nominee names on the proxy card and would be accompanied by the obligation to solicit on behalf of its own nominees.

Furthermore, as discussed above, the proposed mandatory universal proxy system would apply only in solicitations with a competing slate, and therefore, in an election of directors involving only registrant and proxy access nominees, the universal proxy system would not apply. In this type of solicitation, proxy access already provides shareholders voting by proxy with access to a proxy card that reflects all of their voting options for the election of directors.

Proposed SEC Rules Requiring Hyperlinks to Exhibits in Filings

Authors: Jeffrey Nadler and Paul Watkins

On August 31, 2016, the U.S. Securities and Exchange Commission (SEC) proposed rules and form amendments that would require each SEC registrant that is filing a registration statement or current report that is subject to the exhibit requirements under section 601 of Regulation S-K, or that is filing a Form F-10 or 20-F, to include a hyperlink to each exhibit that is listed in the exhibit index of the SEC filing. The proposed rules, which are part of the SEC's comprehensive project to re-evaluate disclosure requirements (the Disclosure Effectiveness Initiative), are primarily intended to allow users of EDGAR to access exhibits in an efficient manner via a hyperlink. As currently proposed, the rules would not require Canadian issuers that are SEC registrants to include hyperlinks to exhibits in multijurisdictional disclosure system (MJDS) forms filed with the SEC.

Background

SEC registrants may, when filing a registration statement or current report, incorporate by reference a document that is listed in the exhibit index of such registration statement or current report by referring to a previously filed registration statement or current report that includes the actual document listed in the exhibit index. This alleviates the need for filers to refile the same exhibit with multiple registration statements and current reports. However, the process of seeking and retrieving exhibits that are incorporated by reference can be both time-consuming and cumbersome because a person must review the exhibit index to determine the filing in which the exhibit is included and then search through the registrant's filings to locate the filing with which the particular exhibit was actually filed.

Scope of the Proposed Rule

The proposed amendments would apply to nearly all forms that are required to include exhibits under Item 601 of Regulation S-K,[16] specifically Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3, F-4, SF-1 and SF-3 under the *Securities Act of 1933*, as amended, and Forms 8-K, 10, 10-D, 10-K and 10-Q under the *Securities Exchange Act of 1934*, as amended; the proposed amendments also include corresponding revisions to Form F-10 and Form 20-F. For periodic or current reports, the active hyperlink to each exhibit would need to be included when the report is filed. If the filing is a registration statement, the registrant would be required to include an active hyperlink to each exhibit only in the version of the registration statement that becomes effective. As currently proposed, the rules would not apply to Form 6-K or Form 40-F or to other MJDS

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[16] Exhibits proposed to be excluded from the rules include XBRL exhibits, exhibits filed on paper under temporary or continuing hardship exemptions and exhibits incorporated by reference that were filed on paper before electronic filing on EDGAR became mandatory (although the SEC sought comment on whether issuers should be required to electronically refile exhibits that were filed on paper before electronic filing became mandatory).

forms (such as Forms F-7, F-8 and F-80) because the exhibits filed with these forms are attached to them.[17]

Currently, filers must submit electronic filings to the SEC using the EDGAR system in either ASCII format or HTML format. HTML has features that allow for hyperlinks that link to another place in the same document or to a separate document. ASCII, however, cannot support functional hyperlinks. Therefore, the proposed rules would require all filings covered by the proposal to be filed in the HTML format. The SEC does not anticipate this HTML requirement to affect many filers, as over 99% of filings that were made in 2015 on the forms that would be affected by the proposed rules were filed in the HTML format. Public comments on the new rules were to be submitted to the SEC on or before October 27, 2016, and the SEC has not yet adopted the rules.

If you have any questions regarding the foregoing, please contact Jeffrey Nadler (212.588.5505) or Scott D. Fisher (212.588.5596) in our New York office.

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The information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstance. For particular applications of the law to specific situations, the reader should seek professional advice.

[17] The SEC did, however, seek comment on whether Form 6-K and/or other MJDS forms should nonetheless be revised to require exhibit hyperlinks.